Supreme Court, U.S.
FILED

JUL 14 2009

OFFICE OF THE CLERK

No. 09-353

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2009

Hal Merritt
Petitioner.
v.
UNITED PARCEL INCORPORATED
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CORRECTED
PETITION FOR WRIT OF CERTIORARI

LA QUETTA M. GOLDEN
Counsel of Record
12311 ASHLEY DR., SUITE D
GULFPORT, MS 39503
GoldensLaw@BellSouth.net
228.832.9111
228.832.9008 (facsimile)
Attorney for Petitioner

QUESTIONS PRESENTED

ISSUE ONE

Whether the lower courts' erred when they dismissed the Petitioner's complaint when he suffered a hostile work environment based upon his race, African-American?

ISSUE TWO

Whether the lower courts' erred in dismissing the Petitioner's complaint when he presented and identified two Caucasian employees who had received preferential treatment?

ISSUE THREE

Whether the lower courts' erred in dismissing the Petitioner's 42 U.S.C. § 1981 claim?

ISSUE FOUR

Whether the lower courts' erred in dismissing the Petitioner's age discrimination claim?

RULE 14.1 (b) STATEMENT

All parties appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

HAL MERRITT,
PETITIONER

VERSUS

UNITED PARCEL SERVICE,
RESPONDENT.

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7. *Harville v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 434 (5th Cir.2005).....5.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this matter filed on April 16, 2009.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit appears at Appendix 1 to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix 2 to the petition and is unpublished.

JURISDICTION

The United States Court of Appeals filed its judgment on April 16, 2009. App. 1. The jurisdiction of this Court is invoked under 5 U.S.C. § 7701 and 5 U.S.C. § 7703.

STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in the case at bar include 42 U.S.C. 2000 (e) pursuant to Title VII of the Civil Rights Statute.

STATEMENT OF THE CASE

Your Petitioner appeals the final decision of the United States Court of Appeal for the Fifth Circuit rendered on April 26, 2009 and the decision from the United States District Court which was rendered on May 2, 2008.

Your Petitioner seeks to reverse the decisions of the lower courts and to reinstate him to his managerial position.

Your Petitioner believes that he has been discriminated against based upon his race [African-American] and age [47] in violation ot Title VII of the 1964 Civil Rights Act.

On August 13, 2004, your Petitioner was discharged
from his position at Respondent's company as Operator Supervisor.

The Respondent terminated your Petitioner for allegedly "falsifying documents." Bob Pritt, Security Manager, said that the Petitioner was discharged because of time card tampering. However, your Petitioner asserts that these reasons are false and they aren't worthy of any credence.

Your Petitioner had been employed since March 17, 1977 for more than 27 years with no prior disciplinary actions taken against him. Prior to your Petitioner's termination, the Respondent

advised management that they needed only one supervisor. At the time, your Petitioner was one of three supervisors.

The other two Caucasian supervisors [one of which is Steve Battie] had less experience than your Petitioner; but both white supervisors maintained their positions. Petitioner asserts that management used a false reason to eliminate his position to satisfy their one supervisor's quota. Immediately following your Petitioner's unlawful termination, one of the Caucasian supervisors was transferred to another job site.

Your Petitioner alleges that based upon his years of experience and service to this company, he should have maintained his position and the other two Caucasian supervisors should have been reassigned their positions. Therefore, the Caucasian supervisors received preferential treatment.

The reason stated for your Petitioner's termination is nothing but mere pretext for discrimination. After having had an administrative hearing, the peer review board held that your Petitioner should have been reinstated into his position. Unfortunately, the Respondent simply ignored the ruling from the peer review board. The Petitioner was only seven years from retirement when he was unlawfully discharged.

Based upon the foregoing, your Petitioner maintains that he has been discriminated against based upon his race and age in violation of Title VII of the 1964 Civil Rights Act.

Your Petitioner further avers that he worked in a hostile environment and said hostility was also based upon his race.

Your Petitioner received his Notice of Suit Rights on July 27, 2006. The Equal Employment Opportunity Commission issued a determination that the Respondent discriminated against your Petitioner based upon his race. (*See* Record, Vol. 1, ¶3, pg 20)

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH PREVIOUS RULINGS

Petitioner respectfully requests this Honorable Court to grant this petition for a writ of certiorari because the contrary rulings held in this cause.

A. ISSUE ONE

WHETHER THE LOWER COURTS' ERRED WHEN THEY DISMISSED THE PETITIONER'S COMPLAINT WHEN HE SUFFERED A HOSTILE WORK ENVIRONMENT BASED UPON HIS RACE, AFRICAN-AMERICAN?

Your Petitioner asserts that he was the victim of a hostile work environment.

To state a hostile work environment claim under Title VII, the Petitioner must show that: (1) the victim belongs to a protected group; (2) the victim was subjected to unwelcome harassment; (3) the harassment was based on a protected characteristic; (4) the harassment affected a term, condition, or privilege of employment; and (5) the victim's employer knew or

should have known of the harassment and failed to take prompt remedial action. *See, e.g., Harvill v. Westward Commc'ns, L.L.C.,* 433 F.3d 428, 434 (5th Cir.2005); *Hockman,* 407 F.3d at 325.

The Supreme Court has emphasized that Title VII's prohibition "is not limited to 'economic' or 'tangible' discrimination." *Meritor Savings Bank FSB v. Vinson,* 477 U.S. 57, 64, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). Rather, "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." *Harris v. Forklift Sys.,* 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)(quoting *Meritor Savings Bank,* 477 U.S. at 65, 67, 106 S.Ct. 2399); *see also Harvill,* 433 F.3d at 434. For harassment to be sufficiently severe or pervasive to alter the conditions of the victim's employment, the conduct complained of must be both objectively and subjectively offensive. *Harris,* 510 U.S. at 21-22, 114 S.Ct. 367. Thus, not only must the victim perceive the environment as hostile, the conduct must also be such that a reasonable person would find it to be hostile or abusive. *Id.* To determine whether the victim's work environment was objectively offensive, courts consider the totality of the circumstances, including (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or merely an offensive utterance; and (4) whether it interferes with an employee's work performance. *Id.* at 23, 114 S.Ct. 367. No single factor is determinative. *Id.* In short, a showing that the employee's job performance suffered is simply a factor to be considered, not a prerequisite. *Mota v. Univ. of Tex. Houston Health Sci. Ctr.,* 261 F.3d 512, 524 n. 33 (5th Cir.2001). As the Supreme Court

stated, "even without regard to ... tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality." *Harris,* 510 U.S. at 22, 114 S.Ct. 367.

Under the totality of the circumstances test, a single Incident of harassment, if sufficiently severe, could give rise to a viable Title VII claim as well as a continuous pattern of much less severe incidents of harassment. *See Harvill,* 433 F.3d at 435-36; *El-Hakem v. BJY Inc.,* 415 F.3d 1068, 1073 (9th Cir.2005) (" 'The required level of severity or eriousness varies inversely with the pervasiveness or frequency of the conduct.' ") (quoting *Nichols v. Azteca Rest. Enters., Inc.,* 256 F.3d 864, 872 (9th Cir.2001)); *Cerros v. Steel Techs., Inc.,* 288 F.3d 1040, 1047 (7th Cir,2002) (stating that severity and pervasiveness are, "to a certain degree, inversely related; a sufficiently severe episode may occur as rarely as once, while a relentless pattern of lesser harassment that extends over a long period of time also violates the statute.") (citation omitted).

The court further found that a regular pattern of frequent verbal ridicule or insults sustained over time can constitute severe or pervasive harassment sufficient to violate Title VII. *See, e.g., Walker v. Thompson,* 214 F.3d 615, 626 (5th Cir.2000) (holding that African-American employees who were subjected to a variety of racial slurs over three-year period raised fact issue as to whether slurs were sufficiently severe or pervasive to violate Title VII); *Farpella-Crosby v. Horizon Health Care,* 97 F.3d

803, 806 (5th Cir.1996) (Petitioner presented sufficient evidence from which a jury could find severe or pervasive harassment where Petitioner was subjected to offensive, sex-based comments two to three times per week).

In the case at bar, your Petitioner can prove that he belongs to a protected group [i.e., African-American; (2) that he was subjected to unwelcome harassment such as the statement by a Caucasian co-worker who told your Petitioner that *he was dressed as a Black tribal chief with a banana in one hand and a chicken leg in the other one and that he should try to get the Chiquita Banana account* (See Record, Vol. 2, 450); (3) the harassment was based on a protected characteristic when the above referenced statement was based upon a racial stereotype of African-Americans loving chicken; (4) the harassment affected the Petitioner's condition, or privilege of employment because the harassment was so severe, he could no longer enjoy his work; and (5) the Petitioner's employer knew or should have known of the harassment and failed to take prompt remedial action. [Id, pgs. 444-449]

Based upon the foregoing acts of unwarranted harassment, the Respondent has fostered a hostile work place by failing to take corrective remedial action against the perpetrators and for failing to offer a work place that is hostile free for all employees irrespective of their race.

Therefore, your Petitioner asserts that he can prove his claim of hostile work environment based upon his race.

B. ISSUE TWO

WHETHER THE LOWER COURTS' ERRED IN DISMISSING THE PETITIONER'S COMPLAINT WHEN HE PRESENTED AND IDENTIFIED TWO CAUCASIAN EMPLOYEES WHO HAD RECEIVED PREFERENTIAL TREATMENT?

Your Petitioner asserted in his complaint that he was terminated based upon his race, African-American, for allegedly falsifying records.(See Record, Vol. 2, ¶11, pg 460)

Next, the Respondent asserts that the Plaintiff cannot establish a prima facie case of racial discrimination under Title VII. Your Petitioner disagrees.

Your Petitioner relies upon *McDonnell Douglas Corporation v. Gree*n, 411 U.S. 792, 802 (1973) where the court held that a prima facie case of racially discriminatory discharge requires proof that Plaintiff (1) is a member of a protected class, (2) was qualified for his job, (3) suffered an adverse employment action; and (4) either was replaced by a

person outside his class or was treated less favorably than similarly-situated, non-protected employees. Also see, *Bryan v. McKinsey & Company, Inc.*, 375 F. 3d 358, 360 (5th Cir. 2004).

Your Petitioner asserts that he can prove a prima facie case of race discrimination. First, your Petitioner is a member of a protected class [African-American].(See Record, Vol. 2, ¶1, pg 439)

Secondly, your Petitioner asserts that he was qualified to perform his job duties as assigned.(See Record, Vol. 2, ¶s 6 &7, pg 459)

Thirdly, your Petitioner can prove that he suffered an adverse employment decision when he was terminated from his managerial position.(See Record, Vol. 21, pg 438). Furthermore, your Petitioner emphatically asserts that said termination was racially motivated and the EEOC also stated that said termination was biased and racially motivated. (See Record, Vol. 2, ¶3, pg 440).

Finally, your Petitioner can show that Caucasian employees [i.e., Steve Beattie and Donna Chennault], were similarly situated, and treated more favorably. (See Record, Vol. 2, ¶2, pgs. 431 & 472).

Your Petitioner hereby submits the following chart to further substantiate his claim of disparate

treatment, to-wit:

NAME OF EMPLOYEE	RACE OF EMPLOYEE	JOB TITLE	CHARGE OF MISCONDUCT	DISCIPLINARY ACTION TAKEN
HAL MERRITT	AFRICAN-AM	MANAGEMENT	Falsify Delivery Record	Terminated
STEVE BEATTIE	CAUCASIAN	MANAGEMENT	Falsify Delivery Record	Suspension
DONNA CHENNAULT	CAUCASIAN	MANAGEMENT	Falsify Delivery Record	Written Warning

Once your Petitioner satisfies his prima facie case, the Respondent must articulate a legitimate, nondiscriminatory reason for its actions. Id, at 802. If the Respondent does so, the burden is shifted back to the Petitioner to rebut the Respondent's explanation. Id. At 804. Particularly, the Petitioner must show (1) the reason is a pretext for unlawful discrimination, or (2) the "reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the Petitioner's protected characteristic." See, *Burrell v. Dr. Pepper/Seven Up*

Bottling Group, Inc., 482 F. 3d 408, 411-12 (5th Cir. 2007).

Your Petitioner emphatically asserts that he is the victim of disparate treatment. The Respondent has adopted a policy which states that they value the diversity that exists in their workforce.(See Record, Vol. 2, ¶2, pg 443)

Furthermore, the Respondent's policy maintains that it treats its employees fairly and without favoritism and that they maintain an environment free of discrimination. [Id, pg. 443]

Your Petitioner asserts that the Respondent has failed to adhere to its own anti-discrimination policy.

Your Petitioner asserts that he was instructed by management how to document packages and he adhered to these instructions. (See Record, Vol. 2, pg 452). Yet, he was unlawfully terminated for following the company's newly enforced policy. The lower court was silent on this issue and didn't address the fact that your Petitioner was following directives issued to him.

Furthermore, your Petitioner asserts that several drivers whom he had supervised issued immediate written statements to management advising management that your Petitioner had not

done anything wrong or unethical.(See Record, Vol. 2, pg. 451) The lower court judge erred when he struck these statements from the record. These statements are critical in showing the disparate and hostile treatment endured by your Petitioner.

Your Petitioner was absolutely shocked that he was summarily terminated. Your Petitioner immediately filed his grievance with the Peer Review Board through his Mediation/Arbitration Request Form.(See Record, Vol. 2, ¶2, pg 453) After a lengthy investigation and engaging in an administrative hearing, the Peer Review Board held that the termination should be reversed and your Petitioner's employment should be reinstated. (See Record, Vol. 2, ¶2, pg 453) .

The Respondent failed to accept the decision of a board that had been adopted by the company. To the Petitioner's dismay, he then filed his charge of discrimination with the Equal Employment Opportunity Commission.(See Record, Vol. 2, pg 439) Amazingly, the Respondent failed to articulate the findings of the Equal Employment Opportunity Commission in their Motion for Summary Judgment. The Equal Employment Opportunity Commission (EEOC) thoroughly investigated your Petitioner's Charge of Discrimination and found that the Respondent had in fact discriminated against the Petitioner based upon his race. (See Record, Vol. 2, ¶3, pg 440) More specifically, the EEOC held the following, to-wit:

...."I have determined that the evidence obtained in the investigation established reasonable cause to believe that Charging Party was discriminated against in violation of Title VII of the 1964 Civil Rights Act, as amended, in that Charging party was discharged from his position because of his race (black).

The documentary and testimonial evidence disclosed that Respondent's disciplinary work rules were uniformly applied. Evidence disclosed that two white employees were accused of committing the same infraction and were allowed to continue their employment..." [Id, ¶ 3]

Your Petitioner asserts that the EEOC reviewed the disciplinary records of the above referenced employees and rightfully concluded that the Petitioner had indeed been the victim of racial discrimination. So, the Respondent's claim that the Petitioner cannot prove that he is the victim of racial discrimination isn't worthy of any credence.

The lower court judge held that it wasn't persuaded that the circumstances surrounding the suspension of Beattie and the written warning issued by Chennault are nearly identical to Plaintiff's admitted falsification of delivery records.

(See Record, Vol. 2, ¶ 1, pg. 609)

Your Petitioner emphatically disagrees with the court's analysis and ruling on the issue of disparate treatment and maintains that the judge's ruling was based upon factually incorrect statements. Both Beattie and Chennault, who are Caucasian managers for the Respondent were also charged with Falisfying Delivery Records. Beattie received a suspension and Chennault received a written warning. Whereas, your Petitioner was summarily terminated. The lower court judge doesn't find that disparate treatment had occurred. Your Petitioner disagrees with this ruling and seeks a reversal on this ground. The lower court held that your Petitioner identified these persons for the first time in response to summary judgment. (Id, pg. 609) Your Plaintiff also disagrees with this statement.

These persons were identified in the EEOC investigation and their identity and records were further produced by the Respondent during the discovery period. (See Record, Vol. 2, pg. 472) Your Petitioner finally avers that his comparator, Beattie was identified in his initial complaint.[1] (See Record, Vol. 2, ¶ 7, pg. 2) This critical document is evident of

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[1] Your Plaintiff-Appellant identified Steve Battie in his complaint. Although the name is misspelled, Steve Battie is correctly identified later as Steve Beattie and is the same person which the Plaintiff-Appellant relies upon as his comparator.

disparate treatment in the workplace and can also be used to show pretext by the Respondent.

Finally, your Petitioner asserts that the Respondent cannot articulate a legitimate reason for the disparate treatment. Since the Respondent has failed to articulate with specificity why it terminated your Plaintiff-Appellant for allegedly falsifying delivery record, but issued a less harsher disciplinary action in favor of Mr. Beattie and Ms. Chennault, then he has proven racial discrimination and the case should proceed to a trier of fact.

Therefore, based upon the foregoing, your Petitioner respectfully disagrees with the lower court's finding that no evidence was produced to prove disparate treatment. What more must the Petitioner prove to show racial animus? Your Petitioner hereby respectfully requests that this case be reversed.

C. ISSUE THREE

WHETHER THE LOWER COURTS' ERRED IN DISMISSING THE PETITIONER'S 42 U.S.C. § 1981 CLAIM?

Next, the Respondent maintains that the Plaintiff-Appellant cannot prove his racial discrimination claim pursuant to 42 U.S.C. § 1981. This section provides equal rights under the law for

African-American citizens. 42 U.S.C. § 1981 states as follows, to-wit:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

In the case at bar, your Petitioner asserts that his rights were violated pursuant to 42 U.S.C. § 1981 when the Respondent failed to give him the same punishment that was given to its Caucasian

employees [i.e, written warning for the same violation]. Conversely, your Petitioner's punishment was more severe and punitive. The Respondent has failed to articulate a legitimate nondiscriminatory reason why your Petitioner was terminated, but the Caucasian employees were not. For this reason, the 42 U.S.C. § 1981 claim should not be dismissed.

D. ISSUE FOUR

WHETHER THE LOWER COURTS' ERRED IN DISMISSING THE PETITIONER'S AGE DISCRIMINATION CLAIM?

Finally, the Respondent asserts that the Age Discrimination claim should be dismissed because the particular statute wasn't denoted in the complaint.

However, your Petitioner asserts that the complaint was specific and gave constructive notice to the Respondent that the Petitioner was also pursing a claim for Age Discrimination.(See Exhibit J, pg. 3 ¶ 12)

In said complaint, your Petitioner asserted that he was terminated because, at the time of his termination, he was only seven years from his retirement date. (Id) The Respondent has failed to refute this assertion. The reason that the Respondent gave for the Plaintiff's unlawful termination [i.e., falsification of records] isn't worthy

of credence when your Petitioner has shown that Caucasian

employees were not terminated for the same offense. As a result of this unlawful termination, your Petitioner lost his entire retirement package.

Your Petitioner asserts that is over the age of 40 at the time of his termination, that the other employees, Steve Beattie and Donna Chennault had less seniority and were not near retirement. Mr. Beattie was hired on January 1, 1981 and Ms. Chennault was hired on August 11, 1988. Whereas, your Petitioner was hired on March 18, 1977 with no prior disciplinary actions taken against him. These younger employees were retained for committing the same offense. (See Exhibit M, pgs. 2 & 4)

Your Petitioner asserts that he has documentation to prove that younger employees were treated more favorably. Therefore, his age discrimination claim should not be dismissed.

CONCLUSION

Based upon the foregoing facts, federal statutes and case law, your Petitioner respectfully requests this Honorable Court to receive this Petition for Writ of Certiorari and grant review on the issues presented.

Your Petitioner has proven through documentary evidence that his federal rights were

violated.

The Equal Employment Opportunity Commission held that the Petitioner was discriminated against based upon his race, African-American. Yet, despite this significant ruling, the lower courts dismissed your Petitioner's complaint.

The Petitioner has devoted his entire career with the United Parcel Service. He shouldn't have been terminated and his termination is based upon his race. Your Petitioner has shown Caucasian employees who were similarly situated who received preferential treatment. These privileged employees were able to enjoy their respective employment while your Petitioner has had to suffer at the hands of discriminatory supervisors.

Your Petitioner seeks justice from this court to rule according to the evidence presented.

Your Petitioner asserts that there exists genuine issues of material facts which should be heard before a trier of fact. Here, in the case at bar, your Petitioner seeks justice against the Respondent who has caused him great harm and mental anguish.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, your Petitioner respectfully requests this Honorable Court to reverse the lower courts' decision and to remand the Petitioner's appeal to the United States District Court to proceed to trial.

Respectfully submitted on this the 17th day of September, 2009.

La Quetta M. Golden

La Quetta M. Golden
Counsel of Record
LAW OFFICE OF LA QUETTA M. GOLDEN
12311 ASHLEY DR., STE. D
GULFPORT, MS 39503
MS BAR NO.: 5880
228. 832.9111
228.832.9008 (facsimile)
GoldensLaw@BellSouth.net
Attorney for Petitioner

APP 1

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-60448

HAL A. MERRITT,

Plaintiff-Appellant,

v.

UNITED PARCEL SERVICE, INC.,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Mississippi
USDC No. 1:06-CV-1072

Before GARWOOD, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:*

Hal Merritt appeals the district court's grant of summary judgment in favor of United Parcel Service, Inc. (UPS) denying Merritt's claims under Title VII of the Civil Rights Act of 19641 and 42 U.S.C. § 1981. We affirm.

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

Merritt, a forty-seven year old African-American, was terminated by UPS after twenty-seven years of employment for allegedly falsifying documents. Merritt admits that he instructed drivers to adjust the deadlines for packages that were not timely delivered to appear as if the deadline for delivery was sometime in the future. His separation form indicates that the reason for termination was 'VIO-Violation of Rules or Company Policy." The description of the reason for separation further states:

Records Falsification (Changed Missed Pieces in PTE);
Instructed Service Providers to record missed/send again packages as "Futures";
Instructed Service Provider to record late NDA package as "requested late."

After his termination, Merritt filed a formal charge of discrimination with the Equal Employment Opportunity Commission (EEOC) alleging discrimination based on race and age. The EEOC determined that evidence obtained in its investigation established reasonable cause o believe that Merritt was discharged because of his race but that the evidence did not establish reasonable cause to believe that he was discharged because of his age. Merritt then filed a complaint in the district court seeking damages for employment discrimination on the basis

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• 1 42 U.S.C. § 2000 e et seq.

of race and age, pursuant to Title VII and § 1981.

After the completion of discovery, UPS filed a motion for summary judgment. UPS also filed a motion to strike Merritt's "Statements of Drivers" that was attached to Merritt's response in opposition to UPS's motion for summary judgment. The district court granted UPS's motions to strike and for summary judgment and dismissed Merritt's claims with prejudice. Merritt timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II.

We reviewed the district court's grant of summary judgment de novo.2 Summary judgment is appropriate if the "pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."3 "Any reasonable inferences are to be drawn in favor of the non-moving party."4 However, a party cannot defeat summary judgment with conclusory allegations, unsubstantiated assertions, or 'only a scintilla of evidence."5 "Rule 56 (e)...required

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2 *James v. Tex. Collin County*, 535 F. 3d 365, 373 (5th Cir. 2008).

3 FED. R. CIV.P. 56 (c.)
4 Robinson v. Orient Marine Co. Ltd., 505 F. 3rd 364, 366 (5th Cir. 2007).

5 Delta *& Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F. 3d 395, 399 (5th Cir. 2008) (*quoting Little v. Liquid Air Corp.*, 37 F. 3d 1069,

the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories and admissions on file, 'designate 'specific facts showing that there is a genuine issue for trial."6

A.

Merritt argues that the district court erred in dismissing his claim that he suffered a hostile work environment based upon his race. Merritt first raised this claim in his response to UPS's motion for summary judgment.

A Court may entertain a Title VII claim only if the aggrieved party has exhausted his or her administrative remedies.7 Merritt did not file a charge of discrimination with the EEOC based on an allegedly hostile work environment. Additionally, the statement from a co-worker and handwritten notes – Merritt's only proffered evidence in support of his hostile work environment claim – were made at least three years before the filing of his EEOC charge for violations of Title VII, long after the statutory period for filing a charge.8 Because Merritt failed to exhaust

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1075 (5th Cir. 1994).

6 *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (*quoting FED R. CIV. P.* 56 (e)(2)).

7 *Taylor v. Books A Million, Inc.*, 296 F. 3d 376, 378-79 (5th Cir. 2002).

8 See 42 U.S.C. § 2000 e-5(e)(1)("A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred...."); cf. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002) ("It does not matter, for purposes of the

his administrative remedies, his hostile work environment claim was properly dismissed.

B

Merritt next argues that he was terminated because of his race in violation of Title VII and § 1981. Claims of racial discrimination based only on circumstantial evidence are evaluated under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green.* 9 A plaintiff must first establish a *prima facie* case of discrimination by showing he: (1) belongs to a protected group; (2) was qualified for the position; (3) suffered an adverse employment action; and (4) was replaced by someone outside the protected class or that other similarly situated employees outside the protected class were treated more favorably.10

Merritt has not provided sufficient evidence to establish a prima facie case of discrimination under Title VII. It is undisputed that Merritt belongs to a protected group and that he suffered an adverse employment action. While the parties disagree as to whether Merritt was qualified, we do not reach this

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statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the clam occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.").

9 411 U.S. 792, 802-805 (1973).

10 *Okoye v. Univ. of Tex. Houston Health Sci. Ctr.*, 245 F. 3d 507,512-13 (5th Cir. 2001)

question because Merritt fails to satisfy the fourth element.

Merritt does not argue that his job was filled by someone outside the protected class. Instead, Merritt contends that two Caucasian employees, Steve Beattie and Donna Chennault, were similarly situated and treated more favorably. "[T]o establish disparate treatment a plaintiff must show that the employer gave preferential treatment to another employee under nearly identical circumstances; that is, that the misconduct for which the plaintiff was discharged was nearly identical to that engaged in by other employees."11

We note that Merritt first identified Beattie and Chennault as comparators in his response to UPS's motion for summary judgment. Before that time, in his response to discovery requests and during his deposition, Merritt identified Rusty Crabtree and Leroy "Buddy" Smith as the similarly situated employees. We need not decide whether Merritt's identification of Beattie and Chennault for the first time after discovery is proper because Beattie and Chennault are not similarly situated.

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11 Id, at 514 (alterations and internal quotation marks omitted); see *Berquist v. Wash. Mut. Bank*, 500 F. 3d 344, 353 (5th Circ. 2007) ('In disparate treatment cases, the plaintiff-employee must show 'nearly identical' circumstances for employees to be considered similarly situated..")

Beattie and Chennault were not in the same position as Merritt and were not accused of committing the same infraction. Beattie was Merritt's supervisor and UPS attributed some responsibility for Merritt's falsification of documents to Beattie because, as the Center Manager, Beattie "should have been aware of the issues and problems in the center." Beattie was suspended but not terminated. Discipline for failure to supervise adequately is not comparable to discipline for knowingly falsifying documents. Nor was Chennault disciplined for falsifying documents. Chennault was issued a written warning because several drivers had told her about Merritt's wrongful actions but she did not notify her manager.

Merritt relies on EEOC's Determination (Determination) that "two white employees were accused of committing the same infraction and were allowed to continue their employment." But neither Merritt's Formal charge of discrimination, nor the Determination contains only a broad conclusion, does not outline the nature of the investigation conducted, and does not outline the nature of the

investigation conducted, and does note cite evidence in support, the Determination does not create a material question of fact to defeat summary judgment. 12

Merritt contends that the district court erred when it struck statements from several drivers who claim that Merritt did nothing wrong or unethical. Merritt has failed to brief this issue adequately, and thus we will not consider it on appeal. 13

Because Merritt fails to present evidence that creates a genuine issue of material fact that other

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12 See *Clark v. Am.'s Favorite Chicken Co.*, 110 F. 3d 295, 297 (5th Cir. 1997) ("Unsupported allegations or affidavit or deposition testimony setting forth ultimate or conclusory facts nand conclusions of law are insufficient to defeat a motion for summary judgment."); see also *Septimus v. Univ. of Houston*, 399 F. 3d 601, 610, (5th Cir. 2005) (holding that summary judgment was appropriate when the plaintiff failed to set forth sufficient evidence of pretext, despite the EEOC's finding of reasonable cause of gender discrimination).

13 *See Yohey v. Collins*, 985 F. 2d 222, 224-25 (5th Cir. 1993).

similarly situated employees were treated more favorably, Merritt's Title VII claim fails.

C

Merritt also contends that the district court erred in granting summary judgment on his age discrimination claim. Merritt brought his age Discrimination claim pursuant to Title VII and § 1981. The district court dismissed Merritt's claim on the ground that he did not assert a violation of the Age Discrimination in Employment Act (ADEA).14 Because we can affirm on any ground raised below, we do not decide whether Merritt's failure to assert a

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14 See *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F. 2d 633, 641 n. 9 (5th Cir. 1985) ("In the employment discrimination context, a prima facie case is established if the plaintiff merely satisfies the standing requirements of the ADEA and presents evidence of differential treatment of younger and older employees. Given these minimal requirements, the failure to establish a prima facie case generally means that there are no material facts at issue."), overruled on other grounds by St. Mary's Honor

violation of the ADEA renders his claim invalid. Instead, we conclude that Merritt fails to provide sufficient evidence to establish a prima facie case of age discrimination under the ADEA

"To make out a prima facie case of discriminatory treatment based on age, the plaintiff are required to prove: (1) they are within the protected class; (2) they are qualified for the position; (3) they suffered an adverse employment decision; and (4) they are replaced by someone younger or treated less favorably than similarly situated younger employees (i.e, suffered from disparate treatment because of membership in the protected class). 15 Merritt fails to satisfy the fourth

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Ctr. V. Hicks, 509 US. 502, 511 (1993).
15 *Smith v. City of Jackson, Miss.*, 351 F. 3d 183, 196 (5th Cir. 2003).

element. Merritt does not allege that he was replaced by someone outside of the protected class. Thus, we need only determine whether Merritt was treated less favorably than similarly situated younger employees. Merritt supports his claim with conclusory assertions that he was terminated because he was seven years from retirement and that Beattie and Chennault were "younger worker." Because we have concluded that Beattie and Chennault were not similarly situated. Merritt does not establish a prima facie case of age discrimination. Accordingly, Merritt claims of age discrimination under Title VII and § 1981 fail.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF

MISSISSIPPI

SOUTHERN DIVISION

HAL MERRITT PLAINTIFF

V. CIVIL NO.:1:06CV1072-HSO-JMR

UNITED PARCEL SERVICE, INC.

DEFENDANT

ORDER AND REASONS GRANTING

DEFENDANTS MOTIONS TO STRIKE AND FOR

SUMMARY JUDGMENT

BEFORE THE COURT are the Motions of Defendant United Parcel Services, Inc. ["UPS"], to Strike [40-1], filed in the above-captioned cause on

March 17, 2008, and for Summary Judgment [33-1], pursuant to FED.R.CIV.P.56, filed on January 28, 2008. Plaintiff Hal A. Merritt ["Mr. Merritt" or "Plaintiff"] has filed Responses to the Motions to Strike [46-1] and for Summary Judgment [36-1], and UPS has filed Rebuttals [47-1], [42-1]. After consideration of the parties' submissions and the relevant legal authorities, and for the reasons discussed below, the Court finds that both Motions should be granted.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff, a forty-seven (47) year old African-American employee of UPS, was terminated by UPS on August 13, 2004, for allegedly falsifying documents. *See* Compl., at ¶ 5. Plaintiff alleges that he was discharged for "time card tampering." *See id.*

His separation form from UPS indicates that the reason for termination was "VIO-Violation of Rules or Company Policy." *See* Separation Form, attached as Ex. "D" to Mot. For Summ. J. The description of the reason for separation further provides that there was

> Records Falsification (changed Missed Pieces in PTE)
> Instructed Service Providers to record missed/ send again packages as "Furtures"
> Instructed Service Provider to record late NDA package as "requested late"

Separation Form, attached as Ex. "D" to Mot. for Summ. J.

Plaintiff had been employed at UPS since 1977, for over 27 years. *See* Compl., at ¶ 6. He had no contract for employment and was an employee at-will. *See* Depo. of Hal Merritt, at p. 16, attached as

Ex. "C" to Mot. for Summ. J. He contends that the stated reason for the termination, the allegation of falsifying documents, was a pretext for discrimination. *See* Compl., at ¶ 8. He admits, however, the he instructed service providers to record missed/send again packages as "futures." *See* Depo. of Hal Merritt, at p. 104, attached as Ex. "C" to Mot. for Summ. J.

The UPS *Policy Book* has a section on integrity, which reads in relevant part, as follows:

> We Insist Upon Integrity in Our People. We understand that integrity is fundamental to how we run our business and essential to maintain compliance with our policies and legal requirements. Operating with integrity means we provide an atmosphere in which our people can perform their jobs in an ethical manner. We present our company honestly to employees and, in turn, expect them to be hones with us.
>
> We expect honesty from our people in all their

> duties, including their handling of money, merchandise, and property with which they are entrusted. We insist on integrity in the preparation and approval of all reports.
>
> The great majority of our people are of high moral character. However, when we do discover a dishonest person in our organization, we deal with that individual quickly and firmly. For our company to be known for its integrity, each of us must meet high standards.

See UPS *Policy Book*, at p. 16, attached as Ex. "H" to Def.'s Mot. (emphasis in original).

Similarly, the UPS *Code of Business Conduct* contains an introductory statement regarding integrity which reads, in relevant part, as follows:

> Since 1907, UPS has built a reputation for honesty, quality, and integrity. It is no coincidence that we have always been highly regarded for these qualities – UPSers have worked hard throughout the years to maintain that the reputation through ethical and legal conduct. Maintaining our integrity· our most priceless asset – is vital to our continued growth and success and is a responsibility

we all share.

Our policy has always been to conduct our business in compliance with all applicable laws and regulation s of the countries in which we do business. Our commitment goes beyond complying with the law to include a sincere and firm belief that we will only conduct business fairly, honestly, and ethically.

An overly ambitious employee might have the mistaken idea that we do not care how results are achieved, as long as results are achieved. That employee would be wrong. We do care how we get results. We do not want results at the cost of violations of laws or through unscrupulous dealings.

The Code of Business Conduct is designed to define UPS's expectations for legal and ethical business behavior for all employees in the UPS organization. It informs and guides us on how to manage our specific everyday business activities. It helps define what is right and what is wrong. Please read carefully and keep it continually in mind.

If any aspect of this Code is unclear to you, or if any situation ever arises· whether it involves you directly or indirectly· that raises in your mind a question about legal or ethical compliance, it is your

personal responsibility to communicate this concern to our company. There are a number of ways to seek assistance. The Code explains these available avenues, including the UPS Business Conduct Line. This issue is critically important to all of us.

We are all privileged to work for one of the best companies in the world. By complying with the law, conducting business ethically with good judgment, and respecting each other, UPS's legacy of honesty, quality, and integrity will live on. Every day, we must work hard to preserve and strengthen that legacy.

The guiding principle is quite simple:

Always Do It Right
Always Do It with Honesty of Purpose

See UPS *Code of Business Conduct*, at pp. 2-3, attached as Ex. "I" to Def.'s Mot. (emphasis in original)

In Plaintiff's deposition, he admitted that he would consider it a violation of UPS's policies

regarding integrity to alter a deliver status report. *See* Depo. Of Hal Merritt, at pp. 77-78, attached as Ex. "C" to Mot. for Summ. J.

Plaintiff filed a formal charge of discrimination with the Equal Employment Opportunity Commission ["EEOC'] on January 24, 2005, alleging discrimination based on race and age. *See* EEOC Charge of Discrimination, attached as Ex. "M" to Mot. for Summ. J. The EEOC determined that evidence obtained in its investigation established reasonable cause to believe that Plaintiff was discharged because of his age. *See* Determination Letter, at p. 1, Ex. "A" to Compl. Plaintiff states that the EEOC issued him a Notice of Right to Sue, which he received on July 27, 2006. *See* Compl., at ¶ 10. Plaintiff filed his Complaint in

this Court on October 20, 2006, seeking damages for employment discrimination on the basis of race and age, pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.,* and 42 U.S.C § 1981.

UPS now moves this Court to completely dismiss the present case based upon Plaintiff's inability to provide sufficient evidence to establish a *prima facie* case of age or race discrimination, or any evidence from which a jury could reasonably find that UPS's grounds for Plaintiff's termination were mere pretext. Plaintiff opposes such dismissal, asserting that genuine issues of material fact exist.

II. DISCUSSION

A. UPS's Motion to Strike

In its Motion to Strike, UPS seeks to exclude " Statements of Drivers" which are attached as Exhibit "F" to Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment. UPS argues that these statements should be stricken because they contain hearsay in the form of conclusory statements and remarks attributed to unidentified third parties. *See* Mot. to Strike, at p. 1. UPS further contends that the statements are undated, unauthenticated, and are inadmissible pursuant to Federal Rules of Evidence 801 and 802.116

Plaintiff concedes that the statements are hearsay, but insists that all exhibits to

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1 UPS asserts that these statements were not produced during discovery. See Mot. to Strike, at p. 1 Plaintiff disputes this. See Resp. to Mot. to Strike, at p. 2. The coCourt need not reach this issue, however, because the Court is of the opinion that the statements

Defendant's Motion for Summary Judgment are also hearsay. *See* Resp. to Mot. to Strike, at p. 1. Plaintiff has not, however, filed any formal motion to strike any of these exhibits. Plaintiff also contends that during his deposition, he gave Defendant the names of the co-workers who made the statements he has submitted. *See* Resp. to Mot. to Strike, at p. 2. As UPS points out, Plaintiff has provided no citation or excerpts from his deposition testimony to support this position. *See* Rebuttal in Supp. of Mot. to Strike, at p. 3. UPS submits an excerpt from Plaintiff's deposition testimony in which he sated that he had not discussed his termination or his lawsuit with any UPS employees. See Rebuttal in Supp. of Mot. to Strike, at pp. 3-4.

The Court is of the opinion that under the Federal Rules of Evidence, the undated, unidentified, and unauthenticated "Statements of Drivers" are clearly inadmissible hearsay, even at the summary judgment stage. Therefore, the Court must grant UPS's Motion to Strike, and it will not consider these "Statements of Drivers" in ruling upon the Motion for Summary Judgment. However, the Court is of the opinion that even if it were to consider these "Statements of Driver," its decision with respect to UPS's Motion for Summary Judgment would nevertheless be the same. In ruling upon UPS's Motion for Summary Judgment, the Court will also not rely upon other statements supplied by UPS in support of its Motion for Summary Judgment, specifically

Exhibit "F" to UPS's Motion, which also contains unsworn statements of witnesses and which Plaintiff alleges constitutes hearsay.

B. UPS's Motion for Summary Judgment

Federal Rule of Civil Procedure 56(c) states that the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56. The purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986);

Meyers v. M/V Eugenio C., 842 F. 2d 815, 816 (5th Cir. 1988).

The mere existence of a disputed factual issue does not foreclose summary judgment. The dispute must be genuine, and the facts must be material. *See Booth v. Wal-Mart Stores, Inc.*, 75 F. Supp. 2d 541, 543 (S.D. Miss. 1999). With regard to "materiality," only those disputes or facts that might affect the outcome of the lawsuit under the governing substantive law will preclude summary judgment. *See id.* At 543 (*citing Phillips Oil Company v. OKC Corp.*, 812 F. 2d 265, 272 (5th Cir. 1987)). Where "the summary judgment evidence establishes that one of the essential elements of the plaintiff's cause of

action does not exist as a matter of law, ...all other contested issues of fact are rendered immaterial." *Id. (quoting Topalian v. Ehrman,* 954 F. 2d 1125, 1138 (5th Cir. 1987)).

To rebut a properly supported motion for summary judgment, a plaintiff must present significant probative evidence, since there is no issue for trial unless must present significant probative evidence, since there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *See Booth,* 75 F. Supp. 2d at 543. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *See Anderson v. Liberty Lobby, Inc.,*

477 U.S. 242, 249 (1986). The non-movant may not rely on mere denials of material facts, nor on unsworn allegations in the pleadings or argumonts and assertions in briefs or legal memoranda. *See Booth,* 75 F. Supp. 2d at 543.

1. *Age Discrimination*

Plaintiff brings his age discrimination claim pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ["Title VII"] and 42 U.S.C. § 1981["section1981"]. *See* Compl., at ¶¶ 1, 4. Plaintiff did not assert a claim under the Age Discrimination in Employment Act ["ADEA"], 29 U.S.C. § 621, *et seq.*, in his Complaint, although he does allege that he was the subject of age discrimination. *See id.*

2. *Race Discrimination*

Title VII makes it "an unlawful employment practice for an employer...to discharge...or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race..." 42 U.S.C. § 2000e-2(a)(1). Similarly, section 1981 states "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts...as is enjoyed by white citizens." 42 U.S.C. § 1981. Title VII discrimination claims

and section 1981 claims share the same analytical framework. *See Roberson v. Alltel Information Services,* 373 F. 3d 647, 651 (5th Cir. 2004). Because both theories of liability rely upon the same facts, the Court will address them together.

a. *Prima Facie* Case

A claim of intentional discrimination can be proved through either direct of circumstantial evidence. *See Russell v. McKinney Hosp. Venture,* 235 F. 3d 219, 222 (5th Cir. 2000). Where the record is devoid of direct evidence of discrimination, the plaintiff must rely on circumstantial evidence to carry his or her burden. *See id.* In establishing causation through circumstantial

evidence, the tripartite burdenshifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies. *See Portis v. First Nat'l Bank*, 34 F. 3d 325, 328 (5th Cir. 1994) ("Because direct evidence is rare, a plaintiff ordinarily uses circumstantial evidence to meet the test set out in *McDonnell Douglas*, [which] establishes a prima facie case by inference.").

Under the *McDonnell Douglas* framework, a plaintiff bears the initial burden of establishing a *prima facie* case of discrimination. *See McDonnell Douglas Corp.*, 411 U.S. at 802. In so doing, a plaintiff must demonstrate that he or she (1) suffered an adverse employment action; (2) was qualified

for the position; (3) was within the protected class at the time of the decision; and (4) that the person selected was not within the protected class, or that others similarly situated but not within the protected class were more favorably treated, or that the plaintiff was otherwise discharged because of race. *See Rios v. Rossotti,* 252 F. 3d 375, 378 (5th Cir. 2001); *Eaves v. K-Mart Corp.,* 193 F. Supp. 2d 887, 893 (S.D. Miss 2001); *See also Brown v CSC Logic, Inc.,* 82 F. 3d 651, 655 (5th Cir. 1996) (holding that the *prima facie* analysis concerning the elimination of an employee's position where no other employees were "similarly situated" fell under the standard evidentiary analysis).

If the plaintiff establishes a prima facie case of discrimination, the burden of production shifts to the defendant to rebut the presumption of discrimination by articulating- not proving- a legitimate, nondiscriminatory reason for the adverse employment action. *See St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 507 (1993); *Bodenheimer v. PPG Indus., Inc.,* 5 F. 3d 955, 957 (5th Cir. 1993); *Guthrie v. Tifco Indus.,* 941 F. 2d 374, 376 (5th Cir. 1991). Once an employer articulates a legitimate, nondiscriminatory reason for its action, the burden shifts to the plaintiff to produce sufficient admissible evidence demonstrating "(1) the employer's reason is a pretext or (2) that the employer's reason,

while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic." *Burrell v. Dr. Pepper/ Seven Up Bottling Group, Inc.*, 482 F. 3d 408, 412 (5th Cir. 2007) (internal citation omitted); *see also Purcell v. Sequin State Bank and Trust Co.*, 999 F. 2d 950, 957 (5th Cir. 1993).

In situations where an employer's reasons are "unpersuasive, or even obviously contrived," the plaintiff must nevertheless prove that the proffered reasons were but a pretext for discrimination. *See St. Mary's Honor Center*, 509 U.S. at 523. Ultimately, in determining whether the case is one of intentional discrimination, "a court should

consider 'the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case." *Crawford v. Formosa Plastics Corp., Louisiana,* 234 F. 3d 899, 902 (5th Cir. 2000) (*quoting Reeves*, 53 U.S. at 148-49). Although intermediated evidentiary burdens shift back and forth under the framework, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Reeves,* 530 U.S. at 143.

It is clear that Plaintiff-an African-American-is a member of a protected class for

purposes of Title VII and section 1981. Further, Plaintiff's August 13, 2004, termination qualifies as an adverse employment action under *McDonnell Douglas.* The Fifth Circuit holds that adverse actions include, but are not limited to, "hiring, granting leave, *discharging*, promoting, and compensating." *Pegram v. Honeywell, Inc.*, 361 F. 3d 272, 282 (5th Cir.2004) (*emphasis added).*

There is a dispute as to whether Plaintiff possessed the qualifications necessary to continue the job duties he was performing. UPS contends that because it lawfully terminated Plaintiff, a managerial

employee, for falsifying records, he was not qualified to remain employed due to his admitted violations of the *UPS Policy Book and UPS Code of Business Conduct*. *See* mem. in Supp. of Mot. for Summ. J., at pp. 8-10 (*citing Bouie v. Equistar Chems., LP*, 188 Fed. Appx. 233 (5th Cir. June 22, 2006); *quoting* Depo. of Hal Merritt, at p. 34-36, 104); *see also* Depo. of Hal Merritt, at pp. 77-78, attached as Ex. "C" to Mot. for Summ. J. (admitting that he would consider it a violation of UPS policy if he has a supervisor who changed delivery status). In response, Plaintiff contends that he was qualified and that his termination was a pretext for discrimination. *See* Mem. in Opp'n to Mot. for Summ. J., at pp. 1-2.

Even assuming that Plaintiff satisfies the first three elements of his *prima facie* case, it is the fourth and final element which proves troublesome. Plaintiff has not demonstrated that his job was filled by someone outside the protected class. Plaintiff instead contends that others similarly situated, but not in the protected class, were more favorably treated, or that he was otherwise discharged because of his race. For employees to be similarly situated, those employees' circumstances, including their alleged misconduct, must have been "nearly identical." *Perez v. Texas Dept. of Crim. J.*, 395 F. 3d 206, 213 (5th Cir. 2004). Plaintiff's burden is to show that the misconduct for

which he was discharged was nearly identical to that engaged in by another employee whom UPS retained. *See id. (quoting Smith v. Wal-Mart Store,* 891 F. 2d 1177, 1180 (5th Cir. 1990)).

In this case, Plaintiff points to the treatment of two Caucasian employees, Rusty Crabtree and Leroy "Buddy" Smith, who allegedly committed similar acts more than six (6) years prior to the acts at issue in the present lawsuit, and who were not terminated by UPS. When asked what Crabtree and Smith did, Plaintiff state, "[t]he same accusation that they said that I did, going in and adjusting the time cards or falsifying information or ever how they doctored it up,

whatever." Depo. of Hal Merritt, at p. 61, attached as Ex. "C" to Mot. for Summ. J. Plaintiff testified that he had "heard the same thing happen [sic] to them twice, two different occasions, and they still have their jobs. All they did was give them a slap on the hand, and they still have their jobs." *Id.*, at p. 62.

In response to these claims, UPS has presented competent evidence that neither Crabtree nor Smith were accused of falsifying UPS documents. *See* Decl. of Terri Trammell, at ¶5, attached as Ex. "L" to UPS's Mot. for Summ. J. At the time of the incidents involving Crabtree and Smith, UPS determined that the two employees had not complied with administrative requirements of

a newly implemented payroll system, but were not guilty of any malfeasance. *See id.*, at ¶ 6. As a penalty, Crabtree and Smith were denied their Christmas stock bonus that year. *See id.* Plaintiff also testified that he did not personally see either Crabtree or Smith tamper with time cards, but his purported knowledge was based on what other people in loss prevention told him. *See* Depo. of Hal Merritt, at p. 62, attached as Ex. "C" to Mot. for Summ. J. Other than conclusory assertions based on hearsay, Plaintiff offers no contrary proof that this is what occurred with respect to those two employees.

The Fifth Circuit has made it clear that

"to establish a prima facie case, a plaintiff need only make a very minimal showing." *Thornbrough v. Columbus & Greenvill R.R. Co.*, 760 F. 2d 633, 639 (5th Cir. 1985), *abrogated on other grounds by St. Mary's Honor Ctr. V. Hicks,* 509 U.S. 502 (1993); *see also Amburgey v. Corhart Refractories Corp., Inc.*, 936 F. 2d 805, 812 (5th Cir. 1991). However, mere allegations and subjective beliefs void of any evidentiary support are insufficient to create an inference of discriminatory intent. *See Roberson v. Alltel Info. Services,* 373 F. 3d 647, 654 (5th Cir. 2004); *Armedarix v. Pinkerton Tobacco Co.*, 58 F. 3d 144, 150 (5th Cir. 1995). The competent

summary judgment evidence does not establish that either Crabtree or Smith were so similarly situated to Plaintiff so as to support his *prima facie* burden. Conduct is "not nearly identical when the difference between the plaintiff's conduct and that of those alleged to be similarly situated accounts for the difference in treatment received from the employer." *Wallace v. Methodist Hosp. Sys.*, 271 F. 3d 212, 221 (5th Cir. 2001) *(citing Wyvill v. United Cos. Life Ins. Co.*, 212 F. 3d 296, 304-05 (5th Cir. 2000)). Moreover, the alleged conduct occurred more than six (6) years prior to Plaintiff's termination and Plaintiff offers essentially nothing more than conclusory assertions and subjective beliefs in

his deposition to support his claim that these two employees were "similarly situated."

In his Response to UPS's Motion for Summary Judgment, Plaintiff also identifies, apparently for the very first time in this case, Steven Beattie and Donna Channault as similarly situated Caucasian employees who allegedly committed similar acts of falsifying delivery documents, but who were not terminated by UPS. *See* Memo. in Opp'n to Mot. for Summ. J., at p. 8. Even if the Court considers this allegation, which Plaintiff raises for the first time in response to summary judgment, the Court is not persuaded that the circumstances surrounding the suspension of Beattie and the

written warning issued to Chennault are nearly identical to Plaintiff's admitted falsification of delivery records.

Beattie was disciplined because he "should have been aware" of the issues and problems at the center, including Plaintiff's falsification of reports. *See* Memo. from Seguin to Pritt, at pp. 2-3, attached as Ex. "E" to Mot. for Summ. J.; *see* Rebuttal n Supp. of Mot. for Summ. J., at pp. 7-8. Plaintiff admits that Beattie never instructed him to tell drivers to record missed and send again packages as futures. *See* Depo. of Hal Merritt, at p. 106, attached as Ex. "C" to Mot. for Summ. J. Chennault was disciplined because she became aware of Plaintiff's actions, but

actions, but did not notify her manager. *See* Memo. from Seguin to Pritt, at pp. 2-3, attached as Ex. "E" to Mot. for Summ. J.; *see* Rebuttal in Supp. of Mot. for Summ. J., at pp. 7-8. The distinction between these two employees' conduct and Plaintiff's essentially amounted to inattentiveness or negligence on the part of Beattie, and inaction on the part of Chennault, as opposed to the undisputed affirmative acts of misconduct in which Plaintiff engaged. Neither Beattie nor Cheannault were found to have falsified any UPS documents or engaged any UPS documents or engaged in any affirmative misconduct, and consequently, their actions do not meet the definition of "nearly identical"

conduct as the Fifth Circuit has applied it.

As discussed above, Plaintiff's fourth and final element of the *McDonnell Douglas prima facie* case could also be shown by demonstrating that he was otherwise discharged because of his race. *See Rios v. Rossotti,* 252 F. 3d 375, 378 (5th Cir. 2001). However, Plaintiff has not provided competent summary judgment evidence that he was discharged because of his race. Plaintiff offers only conclusory averments to support his positon. Construing the evidence in the light most favorable to the non-movant, as the court must, Plaintiff has not met his burden of showing a *prima facie* case of race discrimination.

b. Defendant's Legitimate, Nondiscriminatory Response Assuming that Plaintiff were able to satisfy *his prima facie* case on his race discrimination claim, the burden then shifts to UPS to articulate legitimate, nondiscriminatory reason for Plaintiff's termination. UPS has submitted admissible evidence to support its position that Plaintiff violated UPS;s company policies when he admittedly falsified delivery reports, for which he was terminated. *See, e.g.,* PL.'s Mem. Br. In Opp'n to Mot. For Summ. J. p. 9-10; Separation Form, attached as Ex. "A" to Resp. to Mot. for Summ. J. Because UPS has offered a legitimate, nondiscriminatory reason for its treatment of Plaintiff, the Court finds that UPS has successfully rebutted any initial inference of discrimination.

Assuming Plaintiff could establish a *prima facie* case of race discrimination, in order to survive summary judgment he must show that the proffered grounds were a mere pretext for discrimination.

c. Plaintiff's Burden of showing Pretext

Plaintiff offers insufficient admissible evidence to establish that UPS's reasoning was mere pretext for race discrimination, or that UPS's reasoning-while true- was only one reason for its conduct, and another motivating factor was Plaintiff's race. To succeed at the pretext stage of the *McDonnell Douglas* analysis, a plaintiff must do more than merely discredit the defendant's reasoning; a plaintiff must prove that the articulated reason is a pretext. *See St. Mary's Honor Center v.*

Hicks, 509 U.S. 502, 515-516 (1993); *see also Ryther v. KARE 11*, 108 F. 3d 832, 837 (8th Cir. 1997). Mere subjective assertions, without more, are not enough to obtain relief under the discrimination laws. *See Ray v. Tandem Computers, Inc.*, 63 F. 3d 429, 434-35 (5th Cir. 1995).

Plaintiff has offered insufficient admissible evidence probative on the issue of whether UPS discharged Plaintiff *because of* his race, and has not produced "evidence from which the jury [could] reasonably reject the employer's explanation and from which the jury [could] find that the employer's reason was a mere pretext for discrimination." *Ellison v. Darden Restaurants, Inc.*, 52 F. Supp. 2d 747, 752 (S.D. Miss. 1999).

In support of his assertion that UPS's reason

for his termination was a mere pretext for discrimination, Plaintiff maintains that Ed Poche, Plaintiff's manager in 1998, once made a comment to him during that time about dressing up as a black Indian chief with a banana in one hand and a chicken leg in the other. *See* Depo. of Hal Merritt, at p. 67-68, attached as Ex. "C" to Mot. for Summ. J. The Fifth Circuit has explained that remarks any serve as sufficient evidence of discrimination if the offered comments are: 1) related to the protected class of persons of which a plaintiff is a member; 2) proximate in time to the termination; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue. *See Trotter v. BPB America, Inc.*, 106 Fed. Appx. 272, 2004 WL 1746363, *3(5th Cir.

2004) (*quoting Krystek v. Univ. of Southern Miss.*, 164 F. 3d 251, 256 (5th Cir. 1999)) (race discrimination case). *Brown v. CSC Logic, Inc.*, 82 F. 3d 651, 655 (5th Cir. 1996) (age discrimination case). Comments that are "vague and remote in time" are insufficient to establish discrimination. *See Guthrie v. Tifco Industries*, 941 F. 2d 374, 379 (5th Cir. 1991).

Plaintiff relies upon a single comment made approximately six (6) years before his August 2004 termination. *See* compl, at ¶ 5; Depo. of Hal Merritt, at pp. 67-68, attached as Ex. "C" to Mot. for Summ. J. The incident was not proximate in time to his termination. Nor has Plaintiff presented evidence that Poche had any authority whatsoever over the decision to terminate him, or that Poche's comment was related to that decision. While unquestionably

offensive and inappropriate, this single comment is insufficient evidence of discrimination under the *McDonnell Douglas burden*-shifting analysis for purposes of supporting Plaintiff's claims in this particular case.

Plaintiff also contends, without submitting any other evidence, that the reason that he falsified delivery records was because he was instructed by Ed Johnson, his District Director at UPS, who is also an African-American, to do so. *See* Depo. of Hal Merritt, at p. 104, attached as Ex. "C" to Mot. for Summ. J. Such unsupported, self-serving allegations are insufficient to establish that the reason for his termination was a pretext for discrimination. Moreover, Plaintiff conceded that Steve Beattie, the center manager and his immediate supervisors,

never instructed Plaintiff to tell driver to falsify delivery records. *See id.*, at pp. 78, 106.

Plaintiff relies upon the EEOC Determination letter and the decision of a Peer Review Committee as evidence of discrimination. Each of these are discussed in turn. With respect to Plaintiff's race discrimination claim, the EEOC Determination stated that

> the evidence obtained in the investigation established reasonable cause to believe that [plaintiff] was discriminated against in violation of Title VII of the 1964 Civil Rights Act, as amended, in the [Plaintiff] was discharged from his position because of his race(black). The documentary and testimonial evidence disclosed that [UPS's] disciplinary work rules were [sic] uniformly applied. Evidence disclosed that two white employees were accused of committing the same infraction and were allowed to continue their employment.

EEOC Determination, at p. 1, attached as Ex. "C" to Resp. to Mot. for Summ. J.

EEOC Determination, at p. 1, attached as Ex. "C" to Resp. to Mot. for Summ. J.

"[U]nder precedents of this circuit, EEOC determinations and findings of fact, although not binding on the trier of fact, are admissible as evidence in civil proceedings as probative of a claim of employment discrimination at issue in the civil proceedings." *McClure v. Mexia Ind. Sch. Dist.*, 750 F. 2d 396, 400 (5th Cir 1985). "[D]efendant is free to present evidence refuting the findings of the EEOC or point out deficiencies in the same, with regard to the weight, if any, to e given by the trier of fact to the EEOC determination." *ID.*

Although prior administrative finds can be used as evidence, *see Chandler v. Roudebush*, 425

U.S. 840, 864 n.39 (1976), "in view of the large volume of complaints before the [EEOC] and the nonadversary character of many of its proceedings, court actions under Title VII are *de novo* proceedings...," *McDonnell Douglas*, 411 U.S. at 799 (internal quotations omitted).

The scope of the EEOC's determination is limited, in effect, to a finding that "reasonable cause exists to believe that an unlawful employment practice has occurred or is occurring under Title VII..." *See* 29 C.F.R. § 1601.21(a). "A determination finding reasonable cause is based on, and limited to, evidence obtained by the [EEOC] and does not reflect any judgment on the merits of the allegations not addressed in the determination." *ID.* Because the EEOC's fact finding need only be supported by

substantial evidence, "[d]istrict courts cannot presume the correctness of the EEOC's factual findings." *See Teemac v. Henderson*, 298 F. 3d 452, 455 (5th Cir. 2002) (*citing Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 366-67, 374 (1998); *Chandler*, 425 U.S. at 862). At least one other circuit takes a similar approach.

> Federal anti-discrimination statutes embody a strong presumption in favor of judicial resolution of disputed questions of fact. Prior administrative findings, whatever result may be reached, are ordinarily not entitled to preclusive effect in a subsequent discrimination suit, even though the same facts are in dispute. Whether the prior administrative findings be those of the Civil Service Commission, the EEOC, or any other federal agency is immaterial.

Rosenfeld v. Department of Army, 769 F. 2d 237, 239 (4th Cir. 1985).

A finding of the EEOC does not in and of itself

created a disputed question of material fact. When a determination letter contains only the broadest legal and factual conclusions and does not outline the nature of the investigation conducted, "[t]he EEOC's conclusory opinion, *unsupported by an evidence in the summary judgment record,* is not sufficient to defeat the motion for summary judgment." *Wright v. Columbia Women & Children Hosp.*, 34 Fed. Appx. 151, 2002 WL 495325, *3-*4 (5th Cir. March 18, 2002) emphasis added); *see Cruz v. Aramark Services, Inc.*, 231 Fed. Appx. 329, 335 (5th Cir. Jan. 11, 2007) (holding that "[t]he district court has the discretion to admit the EEOC determination report, but it is not bound by the EEOC's determination of reasonable cause. Moreover, the determination is not sufficient to defeat summary judgment where the determination is not supported by the summary

judgment evident.") (internal citation omitted); *see also Septimus v. Univ. of Houston*, 399 F. 3d 601, 610 (5th Cir. 2005) (holding that summary judgment was appropriate when plaintiff failed to set forth sufficient evidence of pretext, despite EEOC's finding of reasonable cause of gender discrimination).

In this case, the EEOC based its determination on the purported similarly situated employees who retained their jobs at UPS for committing "the same infraction" as Plaintiff. *See* EEOC Determination, at p. 1, attached as Ex. "C" to Resp. to Mot. for Summ. J. However, as discussed previously in Section II(B)(2)(a), the competent summary judgment evidence demonstrates that the circumstances surrounding the misconduct of the

two employees, Crabtree and Smith, was not "nearly identical" to those surrounding Plaintiff's. Therefore, the EEOC Determination is insufficient to create a material dispute of fact, or to establish that UPS's proffered reasons were a pretext for discrimination.

With respect to the decision of the Peer Review Committee, Plaintiff contends that the refusal of UPS to rehire him after the Committee recommended that he be reinstated was evidence of discrimination. *See*. Compl., at ¶ 8. However, as stated in the letter to Plaintiff informing him of its decision, the Peer Review Conference that was held "results in a recommendation, not a decision, instructions or an order." *See* Peer Review

Committee Recommendation Letter, attached as Ex."I" to Resp. to Mot. for Summ. J. The letter is clearthat "the Peer Review recommendation is non-binding, and either party may refuse the recommendation." *Id.* This is also clearly explained in the UPS Employee Dispute Resolution Guidelines. *See* Program Guidelines, at p. 6, attached as Ex. "J" to Mot. for Summ. J.

Though the Committee suggested that Plaintiff's "termination should be reversed and [his] employment reinstated," it also agreed that his actions were wrong and without integrity and recommended that he be give no back pay, annual stock distribution, or half-month bonus, and that he be reassigned to another position/building. *See* Peer Review Committee Recommendation Letter,

attached as Ex. "I" to Resp. to Mot. for Summ. J.; Mem. in Supp. of Mot. for Summ. J., at p. 6. Due to Plaintiff's violation of integrity policies, a finding with which the Peer Review Committee concurred, UPS decided that his termination should be upheld. *See* Mem. in Supp. of Mot. for Summ. J., at p. 6. According to UPS the decision to uphold Plaintiff's termination was made by District Human Resources manager Gwen Lusk, an African-American female, Regional Human Resources Manager Diane Tait-Howard, an African-American female, and Regional Employee Relations Manager Martha Esandon, a Hispanic female. *See id.*

Plaintiff has offered insufficient admissible evidence probative on the issue of whether UPS discharged Plaintiff *because of* his race, and has not

produced "evidence from which the jury [could] reasonably reject the employer's explanation and from which the jury [could] find that the employer's reason was a mere pretext for discrimination." *Ellison v. Darden Restaurants, Inc.*, 52 F. Supp. 2d 747, 752 (S.D. Miss. 1999). This discrimination laws are "not intended to be a vehicle for judicial second-guessing of business decisions, nor...to transform the courts into personnel managers." *Bienkowski v. American Airlines, Inc.*, 851 F 2d 1503, 1507-08 (5th Cir. 1988). For the foregoing reasons, based on the undisputed facts, and viewing the evidence in the light most favorable to Plaintiff, summary judgment is appropriate as to Plaintiff's race discrimination claims.17

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17 The Court notes that, although the parties have not raised the issue, it is unclear whether Plaintiff has fulfilled the condition precedent to receiving a

3. *Hostile Work Environment*

Plaintiff did not plead a hostile work environment claim in his Complaint. Plaintiff's charge of discrimination to the EEOC is also devoid of any allegation of a hostile work environment. *See* EEOC Charge of Discrimination, attached as Ex. "M" to Mot. for Summ. J. In his Memorandum in Opposition to UPS's Motion for Summary Judgment, however, Plaintiff argues, apparently for the first time, that "he worked in a hostile environment and

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right to sue notice from the EEOC before filing his race discrimination claims. Plaintiff states that the EEOC issued him a Notice of Right to Sue, Which he received on July 27, 2006. *See* Compl., at ¶ 10. The Letter to which Plaintiff points is the EEOC Determination letter, which is attached as Exhibit "C" to Plaintiff's Response to the Motion for Summary Judgment. The Determination letter gives Plaintiff notice of right to sue on his age discrimination claim within 90 days of receipt of the letter, but it invites the parties to participate in a conciliation process through the EEOC. The Determination letter contains no notice of right to sue on the race discrimination claim. See Determination letter, attached as Ex. "C" to Pl.'s Resp. to Mot. for Summ. J. No notice of termination of administrative efforts was otherwise provided to the court, even though termination of administrative efforts is a prerequisite for filing suit under Title VII. *See McClain v. Lufkin Industries, Inc.*, 519 F. 3d 264, 273 (5th Cir. 2008).

said hostility was also based upon his race." Mem. in Opp'n to Mot. for Summ. J., at pp. 2, 4-7.

Because no claims of hostile work environment were made in the EEOC charge, which is a statutory prerequisite to filing suit pursuant to Title VII, and such claims should be dismissed for failure to exhaust administrative remedies. Out of an abundance of caution, however, the Court will address this claim, even though it was not adequately pled or included in the EEOC charge.

To bring a Title VII action based upon a hostile environment, a plaintiff must prove: (1) membership in a protected class; (2) unwelcome harassment; (3) based on race; (4) that the harassment affected a term, condition or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to

remedy it. *See Celestine v. Petroleos de Venezuela S.A.*, 266 F. 3d 343, 353 (5th Cir. 2001) (*citing Watts v. Kroger Co.*, 170 F. 3d 505, 509-10 (5th Cir. 1999); *Jones v. Flagship Int'l*, 793 F. 2d 714, 719-20 (5th Cir. 1986)). For harassment to affect employment under the fourth prong, it must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment." *Harris v. Forklift Systems*, 510 U.S. 17, 21 (1193); *see Celestine*, 266 F. 3d at 353 (*citing Watts*, 170 F. 3d at 509). If the harassment is allegedly committed by a supervisor with immediate (or successively higher) authority over the harassment victim, the plaintiff employee needs to satisfy only the first four elements. *See Celestine*, 266 F. 3d at 353-54 (*citing Faragher v. City of Boca*

Raton, 524 U.S. 775, 807 1998)). "Once the plaintiff makes the four-part showing that they have been harassed by a supervisor, the 'employer is subject to vicarious liability to a victimized employee' for the supervisor's conduct." *Id.*, at 354 (*quoting Faragher*, 524 U.S. at 807).

In support of Plaintiff's contention that he was subjected to a hostile work environment, he submits copies of pages of handwritten notes or journal entries that he purportedly made from roughly 1998 through 2001. *See* Journal Entries, attached as Ex. "E" to Resp. to Mot. for Summ. J. Leaving aside any potential statute of limitations issues this evidence may raise, after reviewing the journal entries and Plaintiff's deposition testimony,

the Court is of the opinion that Plaintiff has presented insufficient evidence that any alleged harassment was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment." *Harris*, 510 U.S. at 21. Because Plaintiff is unable to establish that the purported harassment affected his employment, summary judgment is appropriate as to a hostile work environment claim Plaintiff may be asserting in this case.

III. CONCLUSION

For the reasons stated more fully herein, there is insufficient evidence to establish genuine issues of material fact as to Plaintiff's race discrimination claim. Viewing the evidence in the

light most favorable to Plaintiff, the Court finds that Plaintiff is unable to satisfy his burden of establishing a *prima facie* case of race discrimination, nor can he meet his burden of demonstrating that UPS's proffered reason for his termination was a pretext for race discrimination. No reasonable jury could conclude that UPS acted with discriminatory intent based on the *McDonnell Douglas* analysis. Plaintiff's claim of age discrimination claim and any hostile work environment claim must also be dismissed as a matter of law, as discussed in more detail herein.

IT IS, THEREORE, ORDERED AND ADJUDGED, that, for the reasons more fully stated herein, the Motion of United Parcel Services, Inc., to Strike, filed March 17, 2008 [40-1], should be and is

hereby GRANTED.

IT IS, FURTHER, ORDERED AND ADJUDGED that, for the reasons more fully stated herein, the Motion of United Parcel Services, Inc. for Summary Judgment, filed January 28, 2008 [33-1], pursuant to Fed. R. Civ. P. 56, should be and is hereby GRANTED, and this civil action is hereby DISMISSED WITH PREJUDICE.

IT IS, FURTHER, ORDERED AND ADJUDGED that, for the reasons more fully stated herein, all remaining pending motions are hereby DENIED AS MOOT.

SO ORDERED AND ADJUDGED, this the 2nd day of May, 2008.

S/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

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No. 09-353

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

HAL MERRITT,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KIM M. BOYLE
Counsel of Record
PHELPS DUNBAR LLP
365 Canal Street, Ste. 2000
New Orleans, Louisiana, 70130
Telephone: (504) 566-1311
Facsimile: (504) 568-9130

LATOYA C. MERRITT
PHELPS DUNBAR LLP
111 E. Capitol Street,
Ste. 600
Jackson, Mississippi 39201
Telephone: (601) 352-2300
Facsimile: (601) 360-9777

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the lower courts properly dismissed Petitioner's hostile work environment claim.

2. Whether the lower courts properly granted summary judgment in favor of United Parcel Service regarding Petitioner's race discrimination claims brought pursuant to Title VII and 42 U.S.C. § 1981 claim.

3. Whether the lower courts properly granted summary judgment in favor of United Parcel Service regarding Petitioner's age discrimination claim.

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STATEMENT OF THE CASE

Simply stated, this is a case about a management employee who *deliberately* violated UPS' corporate policies on integrity and proper employee conduct, and later manufactured claims of race and age discrimination when UPS terminated him consistent with its policies. Petitioner has presented no "compelling reasons" for his Petition for a Writ of *Certiorari* to be granted ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioner has failed to demonstrate that the Fifth Circuit's April 16, 2009 Opinion is in conflict with a decision of this Court or any other Court of Appeals or that the Fifth Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). Therefore, the Petition should be denied.

I. PETITIONER'S EMPLOYMENT HISTORY.

UPS is a world-wide package delivery company and a provider of specialized transportation and logistics services. 1:258.[1] Hal Merritt was hired by UPS in March, 1977 to work as a part-time package unloader at its Jackson, Mississippi facility. 1:257. Merritt became a full-time employee in 1978. 1:259-60. Throughout his employment with UPS, Merritt was an at-will employee. 1:259.

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[1] The record on appeal contains two volumes of docketed pleadings. In this brief, record pages are cited as volume:page.

Merritt transferred to UPS' Gulfport, Mississippi facility in the early 1980s. 1:264. On May 5, 1986, he was promoted to a preload supervisor position and eventually became an on-road supervisor. 1:263-64. After working in several different management positions[2] and at other UPS facilities[3] throughout the country, Merritt returned to UPS' Gulfport Center as an on-road supervisor. 1:269-71. As the on-road supervisor, Merritt was responsible for training the service providers (drivers) on how to deliver a package from the service center to a customer. 1:263. In this capacity, Merritt also advised the service providers on how to track and code their packages. 1:263-64. Merritt worked in this position until his employment was terminated. 1:271.

II. PETITIONER'S TERMINATION.

On August 14, 2004, Merritt was disciplined and ultimately discharged because he personally falsified Company records and instructed drivers in the Gulfport Center (which he supervised) to falsify their delivery records. 1:298.

Prior to Merritt's termination, UPS, through its Regional Security Manager Bob Pritt ("Pritt"), conducted an

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[2] Merritt worked as a loss prevention manager, car wash supervisor, bench supervisor, Pascagoula, Mississippi Center Manager and as a supervisor trainer. 1:61-264, 268.

[3] Merritt also worked in Covington, Louisiana, Pascagoula, Mississippi, Atlanta, Georgia, Greensboro, North Carolina and Tampa, Florida. 1:265-68.

investigation at the Gulfport Center regarding employee concerns of "alleged falsification of missed packages being recorded as 'futures' and overtime pay being withheld from a preload employee." 1:299-301. The investigation occurred in July, 2004. *Id.* During this investigation, Pritt interviewed and obtained written statements from several service providers. *Id.* Nine (9) drivers indicated that Hal Merritt had routinely instructed them to code missed packages as "futures." *Id.*

During his deposition, Merritt admitted that he instructed service providers to record "missed"/"send-again" packages as "futures." 1:296. At the time, Steve Beattie ("Beattie") was the Gulfport Center Manager and Merritt's immediate supervisor. 1:297. Beattie never instructed Merritt "to tell the drivers to record 'missed' and 'send-again' packages as 'futures.'" *Id.*

Based on Pritt's investigation, it was clear that major service issues existed at the Gulfport Center. 1:314-16. On one occasion, Merritt instructed a driver to record on the delivery record that a customer had requested a late delivery on a package that actually had an early commit time. *Id.* An inquiry into the matter revealed that the customer had not made any such request; rather, the delivery was actually a service failure because the driver was late. *Id.*

Merritt continued his systematic practice of ethical and policy violations in a number of other similar episodes (verified by Pritt through employee statements, interviews and tracking sheets) which ultimately created an illusion of the Gulfport Center's efficiency

that was completely false. 1:314-16. After the investigation, Bob Pritt recommended Merritt's termination. *Id.*

III. PETITIONER'S VIOLATION OF UPS' POLICIES.

Integrity has always been essential to the way UPS does business. 1:317-18. UPS is guided by certain policies and principles which are outlined in the *UPS Policy Book* and the *UPS Code of Business Conduct*. *Id.*; *see also* 1:319-38. Both books are updated as necessary and distributed to all management personnel. 1:272-76.

Merritt's actions were a clear violation of UPS' policy on integrity. 1:292-93. Page 22 of the *UPS Code of Business Conduct* provides, in pertinent part:

> Most of us record or prepare some type of information during our workday, such as financial reports, accounting records, business plans, environmental reports, injury and accident reports, expense reports, and time cards. People inside and outside UPS depend on these reports to be accurate, truthful, and properly maintained. These people include employees, government representatives, auditors, and the communities in which we operate. **No one may deviate from our commitment to manage information accurately and truthfully.** (Emphasis added).

The *UPS Code of Business Conduct* and the *UPS Policy Book* insist that integrity is fundamental to the

Company's operations and expressly forbid falsification of Company documents. 1:331.

IV. THE EMPLOYEE DISPUTE RESOLUTION PROCESS.

A benefit offered by UPS to management and non-union employees is the freedom to participate in an internal Employee Dispute Resolution ("EDR") five-step program. 1:277. After his termination, Merritt elected to participate in this program. 1:278-82. Merritt went through the first four steps of the program, starting with his request to participate, a meeting with the Regional Employee Relations Manager, Martha Escandon (Hispanic female), a peer review and ending with mediation. *Id.* The peer review panel, which consists of three UPS employees – two selected by Merritt and one by UPS, unanimously agreed that Merritt's actions were wrong but voted to reinstate Merritt to his previous position. *Id.* However, because he acted without integrity, his peers agreed that he should not receive back pay, his annual stock distribution or his half-month bonus. *Id.* Further, they recommended that he be assigned to another facility. *Id.*

As stated in the EDR booklet, only the last step in the EDR program, arbitration, is binding. 1:339-48. After much consultation between the District H.R. Manager Gwen Lusk (African-American female), Regional H.R. Manager Diane Tait-Howard (African-American female) and Ms. Escandon, it was decided that in order to maintain consistency with the

integrity policies, Merritt's termination should be upheld. 1:349-51.

REASONS FOR DENYING THE PETITION

Petitioner provides absolutely no plausible factual or legal basis for this Petition. The decisions below do not conflict with a decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not carried his stringent burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10. This Petition is a colossal misuse of the Court's limited time and resources.

I. THE LOWER COURTS PROPERLY DISMISSED PETITIONER'S HOSTILE WORK ENVIRONMENT CLAIM.

Petitioner failed to plead in his complaint and include in his Charge of Discrimination a hostile work environment claim. Petitioner's arguments regarding an "alleged" hostile work environment claim are legally irrelevant to this Court's consideration of the subject appeal as he never properly asserted a hostile work environment claim in this action. The Fifth Circuit Court of Appeals and the district court correctly determined that Hal Merritt failed to plead in his Complaint or assert in his EEOC Charge of Discrimination, a hostile work environment claim against UPS. *See* Pet. App. at 4-5.

Tellingly, in Petitioner's entire five (5) page argument regarding an alleged hostile work environment, he fails to tell the Court that his "alleged" hostile work environment claim was asserted for the *first time* in his Memorandum in Opposition to UPS' Motion for Summary Judgment. *See* Pet. at 4-8. Either Petitioner is confused as to what his action is about, or he is attempting to confuse this Court for purposes of creating an issue to support his baseless appeal.

It is well settled that a court may entertain a Title VII lawsuit *only* if the aggrieved party has (1) exhausted his or her administrative remedies, and (2) has filed suit within the time permitted after receiving a "notice of right to sue." *Taylor v. Books-A-Million,* 296 F.3d 376, 378-79 (5th Cir. 2002), *cert. denied,* 123 S.Ct. 1287 (2003). Indeed, exhaustion of administrative remedies is a prerequisite to filing suit under Title VII and the ADEA. *See Dollis v. Rubin,* 77 F.3d 777, 781 (5th Cir. 1995). Exhaustion occurs when a complainant timely files a charge of discrimination with the EEOC and receives a notice of right to sue. 42 U.S.C. §§ 2000e-5(e)(f); *see also Taylor,* 296 F.3d at 379. Courts should not condone lawsuits that exceed the scope of EEOC exhaustion. *McClain v. Lufkin Industries, Inc.*, 519 F.3d 264, 274 (5th Cir. 2008). EEOC complaints are broadly construed, but only in terms of the administrative EEOC investigation that "can reasonably be expected to grow out of the charge of discrimination." *Id., citing Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 465 (5th Cir. 1970). When a complaint alleges grievances not raised at the EEOC, those allegations must be dismissed. *See id.* at 274, *citing Pacheco v. Mineta*,

448 F.3d 783 (5th Cir. 2006).[4] This is the unambiguous law of the Fifth Circuit, which is in harmony with the law of this Court and all other Circuits.

A review of Merritt's Complaint clearly establishes that nowhere in Merritt's Complaint, which has never been amended, did he make a hostile work environment allegation. 1:11-16. In fact, even Merritt's Charge of Discrimination (by which he is bound for purposes of asserting a violation under Title VII) makes no reference to a hostile work environment claim. 1:352. In its Order, the district court correctly stated, and the Fifth Circuit agreed, that Merritt's "alleged" hostile work environment claim "was not adequately pled or included in the EEOC charge" 1:618. Based on the record evidence and established precedent, the Fifth Circuit correctly concluded that Merritt's only proffered evidence in support of his

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[4] *See also Johnson v. Pointe Coupee Parish Police Jury*, No. 06-31230, 2008 WL 64659 at *1 (5th Cir. 2008) (a plaintiff is precluded from alleging claims that were not included in his EEOC charge). In *Johnson*, plaintiff filed a complaint alleging discrimination under the ADEA and Title VII. *Id.* Although Johnson's EEOC charge alleged race discrimination, claims of age discrimination were never presented to the EEOC for adjudication. *Id.* at *2. Because the age claims were alleged in the federal complaint, defendant filed a motion for summary judgment arguing that plaintiff's allegations were procedurally improper because plaintiff circumvented the administrative process. *Id.* at *1. The Fifth Circuit found that a plaintiff who fails to allege an additional cause of action under an EEOC complaint is precluded from amending his complaint to include the claim, as such omission means that a plaintiff "failed to exhaust his administrative remedy." *Id.* at *2.

hostile work environment claim "[was] made at least three years before the filing of his EEOC charge for violations of Title VII, long after the statutory period for filing a charge."[5] *See* Pet. App. at 4. As such, this Court should give no further consideration to Merritt's Petition and deny the same.

II. THE LOWER COURTS PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF UNITED PARCEL SERVICE REGARDING PETITIONER'S RACE DISCRIMINATION CLAIMS BROUGHT PURSUANT TO TITLE VII AND SECTION 1981.

A. Merritt Cannot Establish a *Prima Facie* Case of Race Discrimination Under Title VII or Section 1981.

In his Petition, Merritt "emphatically asserts" that his "termination was racially motivated." *See* Pet. at 10. However, the record is devoid of any evidentiary basis to support his claim that he was

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[5] *See* 42 U.S.C. § 2000e-5(e)(1) ("A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred. . . ."); *cf. Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 117 (2002) ("It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory period. Provided that an act contributing to the claim occurs within the filing period, the entire period of the hostile work environment claim may be considered by the court for the purposes of determining liability."). In this case, Petitioner had no "acts" that occurred within the filing period.

terminated "because of his race" and consequently, Merritt cannot establish a *prima facie* case of race discrimination.

Claims of racial discrimination brought pursuant to Title VII and Section 1981 are governed by the same evidentiary framework. *Harrington v. Harris*, 118 F.3d 359, 367 (5th Cir. 1997); *Marcantel v. State of Louisiana*, 37 F.3d 197, 198 n. 4 (5th Cir. 1994). To maintain a discrimination claim, a plaintiff must first establish, by a preponderance of the evidence, a *prima facie* case of racial discrimination. To meet this burden, plaintiff must prove: (1) he is a member of a protected group or class; (2) was qualified for his position; (3) was subjected to an adverse employment action; and (4) was replaced by someone outside the protected class or that he was otherwise discharged because of his race. *Shackelford v. Deloitte & Touche, L.L.P.*, 190 F.3d 398, 404 (5th Cir. 1999); *Fields v. J.C. Penney* Co., 968 F.2d 533, 536 n. 2 (5th Cir. 1992).

It is undisputed that Merritt, as an African-American, was a member of a protected class and was subjected to an adverse employment action when he was terminated by UPS. In viewing the facts in the light most favorable to Merritt, the district court accepted his argument that he was *qualified* for his position, "despite his admitted violations of the *UPS Policy Book* and the *UPS Code of Business Conduct*." 1:606. As such, the lower courts turned to the fourth and final element needed to establish a *prima facie* case of discrimination. *Id.* Based on the record evidence, the lower courts correctly concluded that

Merritt had failed to establish that others similarly situated were more favorably treated or that he was otherwise discharged because of his race. *Id.*; *see also* Pet. App. at 6.

1. Merritt's Inability to Proffer Any "Similarly Situated" Employees Who Were Retained Under "Nearly Identical" Circumstances Mandates the Dismissal of His Race Discrimination Claims.

Merritt asserts that others similarly situated, but not in his protected class (Caucasians), were more favorably treated or that he was otherwise discharged because of his race. Pet. at 10-11. The Fifth Circuit has "specifically addressed the plaintiff-employee's burden of proof in disparate treatment cases involving separate incidents of misconduct and has explained consistently that for employees to be similarly situated those employees' circumstances, including their misconduct, must have been 'nearly identical.'" *See Perez v. Texas Dep't of Crim. J.*, 395 F.3d 206, 213 (5th Cir. 2004). Otherwise stated, "[t]he plaintiff must show that the employer gave preferential treatment to another employee under nearly identical circumstances; that is, that the misconduct for which the plaintiff was discharged was nearly identical to that engaged in by other employees." *Okoye v. The Univ. of Tex. Houston Health Science Ctr.*, 245 F.3d 507, 514 (5th Cir. 2001).

Furthermore, Fifth Circuit and the courts encompassed therein, routinely grant summary judgment for employers on discrimination claims where employees erroneously allege they were terminated for workplace infractions, but other employees outside of the protected class who engaged in the same acts were not. *See e.g., Bouie v. Equistar Chemicals LP*, 188 Fed. Appx. 233 (5th Cir. 2006) (affirming dismissal of race discrimination claim where plaintiff simultaneously committed two safety infractions and proffered white comparators were retained after committing one safety violation); *Trotter v. BPB America, Inc.*, 106 Fed. Appx. 272 (5th Cir. 2004) (affirming summary judgment for employer on plaintiff's Title VII race discrimination claim because plaintiff, who was terminated for physical confrontation with his supervisor, was not similarly situated to white employees who were retained after fighting co-workers); *Kelley v. Lockheed Martin Corp.*, 51 Fed. Appx. 483 (5th Cir. 2002) (affirming dismissal of plaintiff's Title VII racial discrimination claim because plaintiff, who was fired for being absent or tardy 49 times in a 2-year period, did not prove his white co-worker, who was absent 24 times in the same period, was similarly situated).

The basis of Merritt's race claim is that two Caucasian employees, Steve Beattie ("Beattie") and Donna Chennault ("Chennault") purportedly committed similar acts and were not terminated by UPS. Beattie and Chennault were not "similarly situated" to the Petitioner. The record clearly establishes that

the only reason that Beattie was disciplined (via suspension) as a result of the investigation is because UPS attributed some responsibility for Merritt's acts to him because as Center Manager "he should have been aware of the issues and problems in the center." 1:299-301. Chennault was issued a written warning because during the investigation, she stated that she became aware of Merritt's actions, but did not notify her manager. *Id.* In stark contrast to Merritt, the district court correctly opined that Beattie and Chennault were not accused of falsifying UPS documents or of instructing service providers to falsify UPS documents. 1:610. Furthermore, the district court stated that "their actions do not meet the definition of 'nearly identical' conduct as the Fifth Circuit has applied it." *Id.* Specifically, the district court concluded that "[t]he distinction between these two employees' conduct and Plaintiff's essentially amounted to inattentiveness or negligence on the part of Beattie, and inaction on the part of Chennault, as opposed to the undisputed affirmative acts of misconduct in which Plaintiff engaged." 1:609-10.

Moreover, the Fifth Circuit following its established precedent, properly determined that Merritt's discrimination claim failed as a matter of law because he was unable to proffer a "similarly situated" Caucasian employee who was retained under "nearly identical" circumstances. *See* Pet. App. at 6-7. Similarly, the Court should not be led astray by Merritt's "red herring" argument. Merritt's clear failure to identify a co-worker who was "similarly situated" but

retained under "nearly identical" circumstances is fatal to his race discrimination claims and contrary to the established precedent of this Court and its circuit courts. Based on the record evidence, Merritt's Petition should be dismissed.

2. Merritt's Reliance on the EEOC Determination Is Legally Misplaced.

Continuing in his baseless efforts to create an appealable issue, in his Petition, Merritt states that "[a]mazingly, the Defendant-Petitioner failed to articulate the findings of the Equal Employment Opportunity Commission in their Motion for Summary Judgment," as if UPS somehow attempted to hide a "smoking gun" by not mentioning the determination letter. *See* Pet. at 13.

As an initial matter, UPS did not refer to the EEOC Determination because it is legally irrelevant to a review of the district court's dismissal of Merritt's race discrimination claims. In *Cruz v. Aramak Services, Inc.*, 213 Fed. Appx. 329, 335 (5th Cir. 2007), the Fifth Circuit held that a district court "is not bound by the EEOC's determination of reasonable cause" and affirmed the court's summary judgment ruling. Moreover, the Court stated that "the determination is not sufficient to defeat summary judgment where the determination is not supported by the summary judgment evidence." *Id.*

In yet another case affirming a district court's granting of summary judgment, the Fifth Circuit held

that "[t]he EEOC's conclusory opinion, unsupported by any evidence in the summary judgment record, is not sufficient to defeat the motion for summary judgment." *See Wright v. Columbia Women & Children's Hosp.*, 34 Fed. Appx. 151, 155 (5th Cir. 2002). The Court stated that "this determination letter contains only the broadest legal and factual conclusions, does not identify the qualifications taken into account by the EEOC, and does not outline the nature of the investigation conducted." *Id.*

Here, the Fifth Circuit also determined that the determination letter in question, "did not create a material question of fact to defeat summary judgment" because it contained only a broad conclusion, does not "outline the nature of the investigation and does not cite evidence in support." Pet. App. at 7-8. "Because Merritt fails to present evidence that other similarly situated employees were treated more favorably," his claims were properly dismissed by the Court.

In light of Merritt's inability to establish that the lower courts' dismissal of his race discrimination claim was in conflict with the established precedent of this Court and all other Circuits, his Petition should be denied.

III. THE LOWER COURTS PROPERLY DISMISSED PETITIONER'S AGE DISCRIMINATION CLAIM.

The Fifth Circuit correctly concluded that the Petitioner "failed to provide sufficient evidence to establish a *prima facie* case of age discrimination under the ADEA. *See* Pet. App. at 10.

To establish an ADEA claim, a plaintiff must show that (1) he is a member of a protected class; (2) he was otherwise qualified for his position; (3) he was discharged from his position; and (4) he was either: (a) replaced by someone outside the protected class, (b) replaced by someone younger, or (c) otherwise discharged because of his age. *Baker v. American Airlines, Inc.*, 430 F.3d 750, 753 (5th Cir. 2005) (citing *Machinchick v. PB Power, Inc.*, 398 F.3d 345, 350 (5th Cir. 2005)). Merritt failed to satisfy the fourth element.

In the Fifth Circuit and other circuits, it is well settled that plaintiff asserting an ADEA claim must establish that he was treated less favorably than similarly situated younger employees. *See White v. Frank,* 718 F. Supp. 592, 595 (W.D. Tex. 1989), *aff'd*, 895 F.2d 243 (5th Cir. 1990), *cert. denied*, 498 U.S. 890, 111 S.Ct. 232, 112 L.Ed.2d 192 (1990).[6] This is

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[6] *See White v. Frank*, 718 F. Supp. 592, 595 (W.D. Tex. 1989), *aff'd*, 895 F.2d 243 (5th Cir. 1990), *cert. denied*, 498 U.S. 890, 111 S.Ct. 232, 112 L.Ed.2d 192 (1990); *Paterson v. Weinberger*, 644 F.2d 521, 524-25 (5th Cir. 1981); *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364, 1369 (4th Cir. 1989), *cert. denied*,

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consistent with this Court's holding in *Gross v. FBL Fin. Servs., Inc.*, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009). In this action, the Petitioner's evidence amounts to an assertion that he was terminated because he was seven years away from retirement and that Beattie and Chennault were younger workers. *See* Pet. at 19. The Fifth Circuit properly held that because "Beattie and Chennault were not similarly situated, Merritt does not establish a *prima facie* case of age discrimination." Pet. App. at 11.

Since the court's conclusion was based on established precedent followed by all the Circuits, the Petitioner again has failed to show a conflict with a decision of this Court or any Court of Appeals and his Petition should be denied. Moreover, Petitioner does not argue in his Petition that any conflicts exist.

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493 U.S. 850, 110 S.Ct. 147, 107 L.Ed.2d 106 (1989); *Ray v. Nimmo*, 704 F.2d 1480, 1485 (11th Cir. 1983); *Ring v. Crisp County Hosp. Auth.*, 652 F. Supp. 477, 482 (M.D. Ga. 1987); *Dodson v. U.S. Army Fin. & Accounting Ctr.*, 636 F. Supp. 894 (S.D. Ind. 1986); *Morgan v. Humboldt County School Dist.*, 623 F. Supp 440 (D.C. Nev. 1985).

CONCLUSION

Petitioner has not established any compelling reasons for this court to grant the Petition. Therefore, Respondent respectfully request that the Petition be denied.

Respectfully submitted,

KIM M. BOYLE
Counsel of Record
PHELPS DUNBAR LLP
365 Canal Street, Ste. 2000
New Orleans, Louisiana, 70130
Telephone: (504) 566-1311
Facsimile: (504) 568-9130

LATOYA C. MERRITT
PHELPS DUNBAR LLP
111 E. Capitol Street,
Ste. 600
Jackson, Mississippi 39201
Telephone: (601) 352-2300
Facsimile: (601) 360-9777

Counsel for Respondent